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WEST END WINS DECISION IN APEX CASE

TRIAL OF ABSORBING INTEREST AND OF VAST IMPORTANCE ENDS WITH JUDGE AVERILL'S OPINION BEING RENDERED

Judge Mark R. Averill handed down an opinion in the fifth judicial district court this morning at 9:10, which puts an end to the most momentous case in the history of mining litigation, because the principle involved is one which gets to the very marrow of the extra-lateral right problem, one which has been the despair of courts ever since the apex right was written into the federal statutes. In this contention the West End receives a clear-cut and unquestionable decision in the suit brought against it by the Jim Butler company, under the surface of whose territory the defendant company discovered and extracted ore until stopped by injunction. In its complaint the plaintiff company alleges that the ore in question which defendant extracted and milled, consisted of 25,000 tons, worth about half a million dollars. Judge Averill dismissed the injunction automatically when he found that the defendant had right and title to the ore mined. The West End has 2500 tons of ore still on the dump and this will probably be worked before proceeding with the extraction from the anticlinal limb that was in dispute. The filing of the opinion created a furore in the stock market.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE.

JIM BUTLER TONOPAH MINING COMPANY, A CORPORATION, PLAINTIFF, VS. WEST END CONSOLIDATED MINING COMPANY, A CORPORATION, DEFENDANT. OPINION.

The decision of this phase of this case in this court is not important upon the questions of law involved, and great responsibility does not rest upon the court in that respect, if it be assumed that the case will be appealed, which is probably not unlikely; but a very great responsibility is imposed upon this court as to its findings upon the questions of fact, which, unless much at variance with the evidence as it appears in the transcript, will probably not be disturbed by any higher court. This then is the task undertaken, to be performed humbly and carefully and with the hope that the results reached may impress those who have no immediate interest in the outcome as rational and correct.

The all-important contention of fact is whether the body of quartz, ore, etc., or the bodies of quartz, ore, etc., in controversy constitute one vein or two. The evidence easily preponderates that it, or they, form but one vein, which will be referred to generally hereinafter as the MacNamara-West End vein. But, though thus found to be one vein, this conclusion is not at all what might be called an absolute one, but is qualified, as will further appear in this discussion.

During the taking of evidence and in the arguments a tendency was occasionally vocally manifested by experts and counsel to view the situation from the standpoint of the miner. Nothing in the law or elsewhere demands of a skilled geologist or lawyer that he view anything as a prospector might or he who wields a shovel, but this tendency had at least the value of preventing these learned gentlemen from wandering too deeply into the often uncertain realms of speculative geology.

Before proceeding farther the positive position must be adopted that things are to be taken as we find them now. Speculative geology will be resorted to, but only for the purpose of explaining the present situation, and without basing any final conclusion thereupon.

Four models were used at the trial, one of which, a skeleton model, offered by the West End, will be called the West End model. The corresponding skeleton model offered by the plaintiff company will be called the Butler model; and the other two, also offered by the plaintiff company, will be called the glass model and the block model respectively.

It will be necessary to refer to three surfaces of the earth over the territory where the vein in dispute now is, the present surface, which will be so called; the surface that existed just before the materials which form the present surface were deposited, which will be called the Trachyte Surface, and the surface which existed prior to the erosion which left the Trachyte Surface and imediately after the vein was formed, which will be called, for want of a better name, the Original Surface. The most ancient of these was the Original Surface and the next the Trachyte Surface, with probably a long period of time, geologically speaking, between them. Prof. Lawson describes another surface, which followed the Midway Andesite flow, and which is of no value to this discussion, except that, in a greatly eroded condition it forms part of the present surface, that part overlying the northeast corner of the West End Claim, extending thence easterly and northeasterly.

References will be made in parentheses. These are all to the transcript of the evidence except as otherwise noted, the name being given in nearly every case that of the witness, but occasionally that of an attorney. The references are given only to statements that are conspicuously in point. Many more could have been given, running into the hundreds, but their worth would be only by way of cumulation.

A pronounced contention of the plaintiff is that the Trachyte Surface formed a hill one of whose slopes faced the west; and that, as a result of erosion, the vein outcropped on that hillside along a northerly and southerly line; and that, assuming the Trachyte Surface to be that surface to which the apical facts should be referred and upon which the lines of the West End Claim should be considered to be imposed, rather than upon the present surface, the apex of the vein crosses the side-lines of the claim; and that, if the West End Claim possesses any extralateral rights, they are defined by the vertical planes of the side-lines projected easterly. This contention is without merit. The evidence easily preponderates that there never existed any such hill slope—that the vein had no such outcrop on the Trachyte Surface, but that its termination, as that now exists in the westerly portion of the West End Claim, is the result of eruption of the volcanic neck known as Mt. Brougher, during which the vein was blown out of existence beyond the line westerly and southerly of where it is now found in the western workings. (Winchell, 1113, 1114, 1115, 1119.) Before that outburst the vein extended onward under the Trachyte Surface, outcropping only as hereinafter described. (This opinion, 16.) All the testimony upon which this contention of an ancient hillside with an outcrop upon it rested was explained away in the rebuttal. (Wiley, 1094, 1090, 1103.)

The plaintiff company rests its case to a great extent upon its claim that the vein is an anticline. That the vein is an anticline, using the word broadly and generally, is true; but strictly speaking it is not true either geometrically or geologically. The difference, however, is merely one of wording of definitions, and is not important. The word "anticline" will serve as a name for the vein-form if properly limited and if no conclusion is drawn from the use of the word that is not justified by its application here. The word "anticline," geometrically speaking, implies the existence of one or two "synclines" or "troughs" lying laterally with it and having the same direction. Nothing of this kind is shown by the evidence in this case; no synclines accompany the anticline. (Lindley on Mines, Section 312.)

At this point an occasion offers to suggest a danger. Whatever result may be reached in this case, it must be based upon an incomplete presentation of evidence. hould it develop in the later mining history of the Tonopah District that the conclusions of fact in this case are wrong, the error should be excused for this reason. The geology of this case is confined to a limited area consisting of the West End, MacNamara, and MacNamara Extension Claims, a considerable part of the Curtis and Eureka Claims, and a very small portion of the Valley View and California Claims, covering an area of less than a tenth of a square mile, though it is apparent that the vein has a much greater sweep and that certain geological features of the controversy involve a large part of the developed portion of the Tonopah District. One of the witnesses for the West End upon being asked how many veins in the West End Claim named, among others, the Lower Contact Vein, but no evidence was given descriptive of it or of its relation to the West End-MacNamara Vein, yet in one of the arguments is found this significant language: " . . . The lower Contact Vein, which is not involved here, but exists, as has been testified here in evidence, where probably a similar condition exists . . " (Lindley's Argument, 30). Several other veins were referred to. (Searls, 985). It may be that every vein named during the trial bears a geological relation to the vein in controversy, and, as the Court is left by the evidence with the MacNamara-West End Vein dipping downward to the north beyond the MacNamara, it is left with the suggestion that development on that side shows something of the geological relation of this vein with others, especially as one attorney used the expression "under many other claims." (Lindley, 1128). The Siebert Fault gets its name in this case from a fault of that name in the territory of the Tonopah Company, but no correlation of the two was demonstrated. The testimony in the case is voluminous, occupying 1130 pages of transcript, yet it is plain to be seen that it could have been much more extensive. All this is mentioned here as cautionary and as indicating how helpless we are in facing great geological problems.

Whether the word "anticline" is applicable here or not, the word "anticlinal" has a broader meaning and is more applicable. It is defined: "Inclining or dipping in opposite directions." "Anticlinal axis" is defined: "A line from which strata dip in opposite directions, as from the ridge of a roof." The MacNamara-West End Vein is anticlinal, using the word liberally; and, if so, it has presumably, an anticlinal axis. As a proposition of law the plaintiff company holds that if this is true, there can be no extralateral rights, because there is no true apex, as the existence of an apex involves the existence of a terminal edge; that there can be no terminal edge if the vein goes up one slope, turns over, and goes down the other. This feature of the case is so momentous that it must be decided as a question of fact first to what extent an anticlinal axis actually exists.

The West End model, upon a scale of "one inch equals forty feet," shows the vein for a length of 2000 feet. In this length is 560 feet of anticlinal axis, and 1440 feet showing no union of the slopes of the vein. In other words a united crest of the vein exists for 560 feet in a length of 2000 feet, or for a little over one-fourth of the whole, or 28 per cent. The vein continues on about one hundred feet farther into the California than is shown on this model. (Finch, 651, 689; Siebert, 746). This reduces the percentage of axis to 27 per cent; and if it continues on farther westerly the percentage of actual axis is correspondingly lowered.

The Butler model upon the same scale shows the vein for a length of 1760 feet, in which distance 640 feet of united crest is shown, or rather assumed to be shown, and 1120 feet is apparently open. The axis, according to this model, is 36.4 per cent of the length of the vein; but this model includes very little of the vein in the ground of the Tonopah Company. The Butler large map, Exhibit 1, shows a united crest for 600 feet in a length of 1800 feet, or 33.3 per cent.

Hereafter in this discussion a diagram marked page 8 will be referred to. It is not drawn to scale and is a little out of proportion in places, but is accurate enough to serve the purpose for which it is used. It is based upon the West End model, because that model shows a united crest of the vein in one more place than does the Butler model. The lines shown on the diagram are, with the exception of a few whose meaning is evident, those adjoining points on the highest parts of the slopes of the vein. The line ABCDEFGH is a continuous "high" line approximately 1440 feet long, all but 480 feet on the south slope and all but about 430 feet in the West End claim. The line CDEFG, a part of the above line, is a continuous "high" line about 1100 feet long, all in the West End Claim, and all on the south slope except 360 feet, which is the anticlinal axis part of this line in that claim. The lines ST, UVW, and XY are lines on the northern slope joining the highest points of the vein on that slope, and are not far from parallel to the "high" line CDEFG on the opposite slope; they contain no part of the anticlinal axis. The line H-6 is also on the north slope, continuing the line CDEFG to the west, and containing no part of the axis. The line 7-8 may safely be considered as a continuation of the long south slope line to the east, and is not a crest line. The lines OP and 9-10 are apparently on the north slope and fairly parallel to the line 7-8-BCD, but they are probably no part of the West End-MacNamara Vein. (Searls, 967, 969).

Between VW on the north slope and DEF on the south slope, there is a union of the two slopes of the vein at KL for 40 feet, a liberal estimate, though one of the witnesses for the Butler gives the distance as 120 feet. Between the line XY on the north slope and FG on the south slope, there appears to be a union of the vein slopes at M for twenty feet, another liberal estimate. Between these two lines, there is also at N, as shown by the West End model, a detached portion of the vein not connected by workings on the vein with any other portion of it, but higher than either FG or XY. The three lines, KL, M, and N probably represent fragments of an anticlinal axis that once existed.

Before proceeding farther it must be noted that the models are "negatives,"—that in general what appears on them as solid represents space underground, stopes, drifts, crosscuts, winzes and raises, and that what appears upon them as space represents solid rock in the larger areas and pillars in the stopes, which condition adds a great deal of difficulty to the making of estimates and the measurements of lines, especially in the area containing the lines KL, M and N. No doubt the vein quarts extends above the "high" lines described above, and no doubt the vein quartz extends east and west of points where the vein shows in drifts, crosscuts, winzes and raises. All this presents no serious difficulty, however, except in the vicinity of KL, M and N. The lines on the diagram are drawn as straight lines between the pairs of points, and of course are only approximations; but they are reasonably close to the truth.

Between the lines 7-8 and 9-10 is no sign of an anticlinal axis. The vein workings represented by them are much higher in elevation that what appears to be the corresponding workings west of them because of the influence of the Buried Fault, which passes between the points 8 and A on the south slope and 10 and O on the north slope. The Edwards Fault, whose effects are the most extensive of any of the faults that occurred in the area under discussion, passes between the points R and V on the north slope. It destroyed the vein between these points, but on the south slope its action was not sufficient to break the continuity of the vein along the line DEF, though it depressed the vein and contributed to its non-existence above the 400 level to any considerable extent between D and E, this effect extending westerly probably to F and Z.

During the argument a certain word was given unusual prominence, the word "obvious," in contrast with which, its newly coined antonym "subvious" demanded marked attention. (Alling's argument, 141; Lindley's argument, 34, 84.) "Obvious" is a good word.

The discussion of the lines of the diagram brings out something obvious. In the western teritory it is obvious that the line H-6 is an apex. Its length was not clearly shown by the evidence, but it is more than 600 feet. From it as a terminal edge the vein dips to the north. It is equally obvious in the eastern territory that the lines 9-10 and O-P are apices, whether the workings they represent are a part of the MacNamara-West End vein or not. If not, it is obvious that the lines 7-8 and BC are apices; and if so, they are still apices, controlling 360 feet of the vein, from which the vein dips to the south. It is obvious that the line DE represents an apex, from which the vein dips to the south; and it is obvious that ST is an apex from which the vein dips to the north. It is obvious that EF and FG are apices, except as interfered with by the lines KL, M and N; and that VW and XY represent apices except as interfered with by the same lines. From EF and FG the vein dips south, and from VW and XY the vein dips north. The only "subvious" place is the region between EFG on the south and VWXY on the north, extending from K to G. On the Butler model this region is 520 feet long, of which all but 120 feet along where the crest line is supposed to be is space, that is, rock, the 120 feet being represented by the line KL. On the West End model this region is 440 feet long, of which 100 feet appears to be along the crest line, in three parts, 40 feet, 20 feet, and 20 feet long respectively, represented by the lines KL, M and N, one of which, N, is a doubtful piece. On the Butler map, Exhibit 1, this region is shown as 520 feet long, containing two crest connections, one at KL and one at N. It looks as though some one or more had taken it for granted that a crest line exists through this region for 520 feet or more, which brings out a curiously contradictory state of affairs, the West End people being willing to find the point at which the crest line crosses their north side-line in this region at a point 1142½ feet from their northeast corner and "in space." (Richardson, 47.) And yet they put up none of their famous "A Raises" in that region. The Butler people, to whom the anticlinal axis is vital, though they did considerable work in West End territory, left 520 feet of that axis in a very doubtful condition. One of the counsel for the plaintiff terms it "Terra incognita," in which, however, he includes the space from G to D, 760 feet in length down the supposed slope of the anticlinal axis. (Lindley's argument, 39.) Why was not exploration done in this "Unexplored country"? The answer is obvious; the burden rests upon the defendant to show an apex through doubtful territory. (Lindley's argument, 40.) Yet the same counsel says that his figure 147 represents the Butler contention. (Lindley's argument, 30.) Figure 147 is a colored picture of the Butler block model, of which something will be said later.

To sum up at this point, it may be said that on the south slope of the vein apices exist at 7-8, BC, DE, and H-1, that an anticlinal axis exists along CD and GH, and that an apparent apex along EFG is thrown into doubt by the unexplored condition from K to G. In West End territory are to be found 360 feet of anticlinal axis, 200 feet of apex, and 480 feet of apparent apex thrown into doubt by the unexplored condition from K to G, all on the south slope toward the Butler side-line except the 360 feet of axis.

Why devote so much attention to the lines described, as no issue of this kind was made by either side, the West End claiming its apex in the immediate vicinity of the anticlinal axis and the Butler claiming the non-existence of an apex in the same vicinity, but instead thereof the crest of a roll? In other words, why go out of the issues as made during the progress of the case? The answer is composed of several reasons: 1. The discussion is within the issues as made by the pleadings; 2. Because the condition is an obvious one; 3. Because the evidence introduced by both sides shows the condition described; 4. Because the condition described might have been the basis of a compromise; 5. Because the condition described tends to strengthen the position hereafter to be taken; 6. Because it correlates so well with one of the arguments in the case; (Dickson's argument, 30 et seq.) 7. Because it has an important bearing on the block model; 8. Because it gives this case a peculiar status of its own, bringing it somewhat into the ordinary apex class; 9. Because it casts upon the anticlinal axis the conception of a common apex, rather than merely the crest line of a roll.

The Butler company offered a model in evidence generally referred to as the block model, which as noted above, has been said to represent its contention. As an exhibit this model is open to objection. It shows the present surface, consisting of Fraction Dacite Breccia to the west and south and Midway Andesite to the northeast. By removing the block representing the Breccia the Trachyte Surface is uncovered in the western part of the claim and the Midway Andesite surface in the northeastern corner. By removing two more blocks representing the Midway Andesite above and the Mizpah Trachyte below, the vein itself is uncovered. All this is ingenuous as well as artistic and of value as hereafter noted, but the vein is represented as a continuous sheet from a north-and-south vertical plane east of the West End Claim to a similar parallel plane west of it. (Lindley's argument, 134.) Mr. Lindley states in several places in his argument that the defendant company admits the continuity of the vein from the alleged apex to the ore bodies in dispute. (Lindley's argument, 8.) An admission of this kind was made, but it meant that one could start in the western ore-body in dispute and go up in the vein to the crest, and likewise from the eastern ore-body in dispute. It can mean no more, because the evidence will not permit a broader interpretation. (Finch, 671.) The vein does not exist in one unbroken sheet as depicted on the model, not, at any rate, as shown by present development. If, therefore, the Butler contention rests upon this model, it rests upon a foundation consisting largely of assumption, which, however, might have been turned into fact in part by proper development of the "Terra incognita." But as representing the Trachyte Surface the model has some value, especially in the western area. Such a surface must have existed; and in all likelihood the vein was exposed on this surface, using here the word "vein" in its broadest sense.

The evidence will show, especially that of the plaintiff, that its witnesses and attorneys used two conceptions of what the vein is. When the miners engaged in development work were told to follow the vein, and did so, it meant the solid quartz, with perhaps a showing of ore; but the witnesses, some of them, were quite positive that the vein includes much more than this. (Finch, 650; Searls, 981; Section Map G, Searls, 4). The witnesses Finch and Searls and some others include within their conception of the vein the "halo," or "stringer zone" or "streamer zone," which is no doubt geologically correct.

The defendant company claims two apices along the anticlinal axis, one for the north-dipping vein and one for the south-dipping vein. The latter vein, according to this theory apexes along the line where it abuts against the north-dipping vein, while the latter apexes along an irregular line above the other vein as indicated by the quartz exposures in the "A Raises." The finding has already been made that there is but one vein, which, having disposed of the two-vein theory, now requires a consideration of what the "A Raises" do show. The plaintiff's witnesses admit these raises, some of the bodies of good size and considerable length; but they include them in the "stringer zone" of the vein, or its "halo." Some of these are large, from three to five feet in thickness, which, were it not for inescable comparison with the immense quartz bodies in the MacNamara-West End Vein itself, would never be termed "stringers." The larger ones are probably not stringers, geologically or otherwise; they are not part of the "Stringer Zone," but are part of the "Halo," the distinction being readily grasped; that is to say, they constitute an upward extension of the main vein toward the surface.

They follow to some extent, though not very closely, a gouge hanging wall, which the West End people assert is the hanging wall of the north-dipping vein, but which the Butler people ascribe to the Siebert Fault. This interesting and evidently conspicuous phenomenon received some rather strong jolts on the rebuttal (Wiley, 1100; Winchell, 1119); but hardly enough to jolt it out of the case. That it exists, or something of the kind exists, was proven. It is probably a group of faults, rather than one great fault, easily correllatable with a great fault in the Tonopah Company's territory. One distinguished witness called it eccentric and said it was subject to undulations. (Lawson, 1031, 1060.) It had the effect of shearing the "halo" on the north side and of lowering the Mizpah Trachyte surface on that side, at least in the vicinity of the anticlinal axis, from which it may safely be inferred that the "halo" was once in a much more regular condition than at present, much less broken and crushed, and much more extensive. As the Mizpah Trachyte Surface exists now, the halo reaches it. This is illustrated on West End cross sections B, C and D, and by the Section Maps corresponding to glass sections 1, 3 and 4; and is strongly suggested to all the other Section Maps corresponding to the glass sections, which show the trachyte over the vein to be very thin. As the Mizpah Trachyte Surface existed before affected by the faults, the quartz of the halo reached it, because the halo must have been more extensive then than now and must have been carried down on the north with the trachyte. Therefore, if the vein is referable to the present Mizpah Trachyte Surface, it has outcrops of quartz on that surface; if referable to the Mizpah Trachyte surface before the faulting, it had out crops of quartz on that surface. The models and section maps indicate very strongly that the halo reached the Original Surface. The evidence is conclusive that when the fissures were formed in which, or associated with which, the vein is found, intense shattering occurred along the inticlinal axis, especially under the crest. Whatever caused the formation of the fissures, its action was far-reaching enough to create sub-parallel fissures. (Lawson, 1000.) There are evidences of three of these in this case, and perhaps more, two of which attain to the dignity of veins, and they are workable veins, that is, they contain ore of commercial value. One of them, the Fraction Vein, is important enough to be a bone of contention in another suit. Its crevice was undoubtedly a channel of circulation that reached the surface, through which channel the "ascending magnetic amanations" sought escape. The same may be said of the South Vein. It is a striking fact that both these branch veins rise on their dip into an area which would include also the quartz bodies in the "A Raises," unless they crossed each other, which is very improbable. This area may be assumed to lie on the original surface, and was a venting ground of this great vein and its branches. But are the veins in the "A Raises" comparable with the Fraction Vein? They are of good size, some of them probably as thick as the Fraction Vein in parts of its course. They contain ore. (Bradley, 316, 331, 338.) They are respectable and probably were more so before the playful Siebert Fault came their way. The quartz in them is not oxidized, which fact might argue against their having reached a surface; but half a dozen explanations can be offered against any such conclusion, one of which is that unoxidized veins are often found that undoubtedly reached a surface when forming, perhaps some in the Tonopah district. Before leaving this phase of the case, attention should be called to what lies east of the line "S-S" on Defendant's Exhibit D. (Searls, 979.) This is a map of the 400 level of the West End, just under which it is claimed the toe of the anticline is to be found; and everything east of the line "S-S," the toe-line, is in the halo, which, scaled on the map, is found to extend away from the main vein easterly about two hundred feet, and above it, as scaled on the model, 100 feet. This indicates the strength

(Continued on Page 4.)